

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN - 7 1993

In the Matter of

Implementation of the Cable
Television Consumer Protection
and Competition Act of 1992

Broadcast Signal Carriage Issues
Reexamination of the Effective
Competitive Standard for the
Regulation of Cable Television
Basic Service Rates

Request by TV 14, Inc.
to Amend Section 76.51 of the
Commission's Rules to Include
Rome, Georgia, in the Atlanta,
Georgia, Television Market

92-259
MM Docket No. 92-259

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 90-4

MM Docket No. 92-295
RM-8016

OPPOSITION TO PETITION FOR RECONSIDERATION

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SUMMARY

On March 29, 1993, the Federal Communications Commission released its Report and Order adopting rules to implement the mandatory signal carriage ("must-carry") provisions of the 1992 Cable Act. These provisions accorded every local full-power commercial television station must-carry rights in its market, which was defined as the station's Area of Dominant Influence ("ADI"). In keeping with the Cable Act's goal of promoting localism, the Commission adopted a rule providing that every station's home county will be included in its market, even if the home county lies outside the ADI to which the station is assigned by Arbitron.

Cypress Broadcasting, Inc., licensee of Station KCBA(TV), Salinas, California, seeks reconsideration of this rule (the "home county exception"), arguing that the rule is not permitted under the Cable Act; that the Commission's action resulted in a modification of the market of Station KNTV(TV), San Jose, California, which was not supported by a proper evidentiary record; and that the Commission deprived Cypress of its due process rights by not giving it proper notice of the adoption of this rule.

As demonstrated herein, nothing in the Cable Act precludes the Commission's adoption of the home county exception, which is, indeed, an eminently appropriate and logical solution to the problem of preserving local carriage of stations that are licensed to communities outside their ADIs. Moreover, the

Commission has not modified Station KNTV(TV)'s market without sufficient record evidence, as claimed by Cypress. Station KNTV(TV)'s market is defined to include its home county through a rule of general applicability to all television broadcast stations, rather than through an individualized determination. Moreover, Cypress had adequate notice of the adoption of this rule and was in no way deprived of its due process rights.

Thus, Cypress's arguments are without merit. Cypress repeatedly fails to cite any support or authority for its claims, a number of its arguments are irrelevant to the issue of the home county exception, and in more than one instance Cypress mischaracterizes the Cable Act. In sum, Cypress's Petition for Reconsideration should be denied.

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full-power commercial television station will be considered a must-carry station in its home county, even if the home county lies outside the Area of Dominant Influence ("ADI") to which the station is assigned by Arbitron.^{2/} As demonstrated below, Cypress's arguments are totally without merit, and its Petition should be denied.

I. Introduction

Granite is the parent corporation of KNTV, Inc., the licensee of Station KNTV(TV) ("KNTV"), whose community of license is San Jose, California. San Jose is located in Santa Clara County, which is part of the San Francisco-Oakland-San Jose ADI. Since the 1950s, however, Arbitron has assigned KNTV to the Salinas-Monterey ADI. Cypress is the licensee of Station KCBA(TV) ("KCBA"), which is licensed to Salinas, California, and also is assigned to the Salinas-Monterey ADI.

In its Report and Order, the Commission adopted rules to implement the mandatory broadcast signal carriage provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act" or the "Act").^{3/} Under these provisions, every full-power commercial television station is

^{2/} Report and Order, ¶ 39.

^{3/} Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.). The Cable Act amends the Communications Act of 1934. The signal carriage provisions are contained in Section 4 of the Act, which is now Section 614 of the Communications Act of 1934, as amended. Following the convention of the Commission in its Report and Order, this Section is referred to herein as Section 614 of the Cable Act.

accorded must-carry rights on cable systems within the same market, with a station's market being defined as the ADI to which it is assigned by Arbitron and its home county, even if that county belongs to a different ADI.^{4/} In addition, the Cable Act provides that the FCC may modify a station's market to include communities outside its ADI.^{5/} Under the mandatory signal carriage provisions adopted by the FCC, KNTV is a must-carry station in the counties listed in the Salinas-Monterey ADI and in Santa Clara County, its home county.

Cypress challenges the Commission's decision to grant must-carry status to every station in its home county on the ground that this decision is not permitted under the Cable Act. Cypress further contends that the Commission's action resulted in a modification of KNTV's market that was not supported by a proper evidentiary record and that the FCC may modify KNTV's market only through a rulemaking proceeding that redefines the must-carry market of all stations assigned to the Salinas-Monterey ADI to include Santa Clara County. In addition, Cypress claims that the Commission deprived it of its due process rights by adopting what it refers to as the "home county exception" in its Report and Order without giving notice that such a rule was under consideration and without affording Cypress an opportunity to be heard on the subject.

^{4/} Cable Act, § 614(h)(1)(C); Report and Order, ¶ 39.

^{5/} Cable Act, § 614(h)(1)(C).

As discussed below, Cypress's arguments are without merit. Cypress repeatedly fails to cite any support or authority for its claims, and its arguments are largely irrelevant to the issue of the home county exception. Moreover, in more than one instance Cypress seriously mischaracterizes the Cable Act.

II. The Commission's Decision to Adopt the Home County Exception Is Not Contrary to the Language of the Cable Act

According to Cypress, the Commission's decision to accord must-carry rights to every station in its home county, even when the station's home county lies outside the station's ADI, is contrary to the express language of the Cable Act. Petition at 3-7. However, an examination of the language of the Cable Act, and in particular the Act's signal carriage provisions, demonstrates that this claim is totally baseless. Indeed, any rational reading of the Cable Act supports the conclusion that the Commission's home county exception is wholly consistent with the express terms of the broadcast signal carriage provisions of the statute.

Cypress correctly states that Section 614 of the Cable Act accords must-carry rights to local commercial television stations within their markets and that a station's market includes its Arbitron ADI. Cypress further correctly notes that Section 614(h)(1)(C)(i) authorizes the Commission to include "additional communities" within a station's market. At this point, however, Cypress's reading of the Cable Act becomes utterly ridiculous, for Cypress makes the totally unsupported

claim that the addition of a county to a station's market "is in direct violation of the Cable Act." Petition at 5. In fact,

nothing in the language of the statute even remotely suggests

An examination of the legislative history of the Cable Act shows that Congress was indeed aware that, as the House Committee on Energy and Commerce stated in its Report, "since ADIs are drawn along county lines, they may, in some instances, inaccurately reflect the stations which are local to a particular community."^{7/} Thus, Congress authorized the FCC to make adjustments to an individual station's market -- by adding or deleting communities -- in response to a written request. Such individual adjustments are, however, entirely separate from the home county exception, which the Commission adopted as a rule of general applicability that applies to all stations whose home counties lie outside their ADIs.^{8/} Thus, the use of the term "communities" in connection with individual requests for market adjustments in Section 614(h)(1)(C)(i) of the Cable Act does not preclude the home county exception, and nothing in the Act

^{7/} H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

^{8/} The language of Section 614(h)(1)(C)(i) plainly says that the addition of communities to a market is to be undertaken "with respect to a particular television broadcast station." Cable Act, § 614(h)(1)(C)(i) (emphasis added). Moreover, the fact that the home county exception is a general rule that is totally separate from the modification of an individual station's market in response to that station's request is absolutely clear from the Commission's Report and Order. Thus, the Report and Order describes the home county exception in paragraph 39, in the context of the general definition of local television markets. On the other hand, it discusses the addition of communities to a particular market in paragraphs 42 through 47, under the heading "Modification of ADI Markets." and its discussion makes it clear

suggests that the Commission is prohibited from exercising its rulemaking authority to adopt such an exception.^{9/}

In short, the terms of the Cable Act simply do not preclude the addition of a station's home county to its must-carry market, and Cypress's attempt to claim that they do is not only unavailing but also frivolous. Moreover, as discussed in more detail below, because ADIs consist of counties, and not individual communities, the Commission's home county exception is wholly consistent with not only the Cable Act but also the FCC's rules.

III. Cypress's Claim That the Commission's Adoption of the Home County Exception Fails to Meet the Cable Act's Evidentiary Requirements Is Erroneous

Recognizing that the Cable Act authorizes the FCC to consider written requests submitted by individual stations to have additional communities added to their market for must-carry purposes, Cypress claims that, in the case of KNTV, the evidentiary requirements set out by the Cable Act in connection with such requests have not been met. Thus, Cypress argues that Granite failed to comply with the "four statutory requirements" of Section 614(h)(1)(C)(ii) of the Cable Act when it requested in its Comments on the Commission's Notice of Proposed Rulemaking

^{9/} Indeed, nothing in the Act prohibits the Commission from adding a county to an individual station's market. Even under Cypress's strained reading of the statute, the FCC clearly has authority to add all of the constituent communities of a county to a must-carry market. Given this fact, and the fact that ADIs are defined by county, it strains credulity to construe the Cable

that KNTV's market be defined to include the station's home county of Santa Clara. Petition at 8.

This argument is entirely misplaced because, contrary to Cypress's contention and as noted above, the Commission's adoption of the home county exception in its Report and Order is not a modification of one must-carry market granted in response to an individual station's written request under Section 614(h)(1)(C)(ii) of the Cable Act. Instead, the Commission adopted the home county exception as a regulation of general applicability pursuant to its rulemaking authority. Thus, Cypress's contention that the modification of KNTV's market is unsupported by record evidence is inapposite.

Moreover, it was appropriate for the Commission to add Santa Clara County to KNTV's market through a rulemaking proceeding, as opposed to an individual adjudicatory proceeding, because every similarly situated station -- that is, every station whose home county lies outside its ADI -- should have its market defined to include its home county. All stations are required by law to serve their local service area, which normally includes not only the community of license but also a substantial portion if not all of the surrounding county. To serve the Cable Act's goal of promoting localism, the Commission should include the home county of every station in its market for must-carry purposes and therefore should do so through the adoption of a general rule and not on an ad hoc basis.

However, even assuming arguendo that the Commission's action is construed as a specific modification of KNTV's market in response to its Comments, Cypress's claim is totally without merit because it is based on a misreading of the Cable Act. According to Cypress, Section 614(h)(1)(C)(ii) of the Cable Act "spells out the precise matters the Commission must consider" in ruling on an individual station's request to have its market expanded beyond its ADI for must-carry purposes. Petition at 7. However, the language of Section 614(h)(1)(C)(ii) clearly indicates that the four factors enumerated are not all required to be addressed. The introductory language of the provision reads as follows:

In considering requests filed pursuant to clause (i), the Commission shall afford particular attention to the value of localism by taking into account such factors as --

Cable Act, § 614(h)(1)(C)(ii). Thus, the plain language of this provision -- in particular, the phrase "such factors as" -- indicates that the four factors enumerated are not all required to be addressed; rather, they are examples of the kinds of questions the Commission is directed to consider as part of its review of a request. The focus of concern in this provision, as in the Cable Act generally, is the value of localism. The list of factors set out in the provision for the Commission's consideration is obviously a suggested means of addressing the

issue of localism and does not consist of a rigid and mandatory set of evidentiary requirements.^{10/}

IV. The Commission May Properly Add Santa Clara County to KNTV's Must-Carry Market Without Automatically Redefining KCBA's Market

Continuing to elaborate on its distinction between "communities" and "counties," Cypress contends that while the Commission may add communities to a station's market in response to a station's request, the FCC may not add Santa Clara County to

^{10/} The legislative history of Section 614(h)(1)(C)(ii), which was originally part of the House version of the bill, demonstrates that the four factors set out in this provision were not intended to constitute a rigid evidentiary requirement. Thus, the House Report states: "These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market. The criteria include such factors as" H.R. Rep. 628, at 97 (emphasis added).

Moreover, the Commission's Report and Order stresses the flexibility with which the FCC will approach these four factors.

the Salinas-Monterey ADI "for the sole benefit of KNTV."

Petition at 10. According to Cypress, the FCC may add Santa Clara County to KNTV's market only if it does so for all stations located in the Salinas-Monterey ADI. Cypress does not, and can not, cite any facts or any legal authority to support this novel proposition. Moreover, Cypress grossly mischaracterizes the Commission's action in its Report and Order by describing it as being for the "sole benefit of KNTV." As discussed above, the home county exception is a rule of general applicability that defines the market of every station in the United States whose home county lies outside its ADI. The rule applies to KCBA, although it does not specifically benefit KCBA because its home county is within its ADI.

Missing this crucial point entirely -- or choosing to ignore it -- Cypress engages in the same type of irrelevant discussions used in connection with its other arguments in an unpersuasive effort to coax the Commission into thinking a credible argument has been presented. Thus, using as its premise the unsupported and erroneous assumption that the Cable Act prohibits the addition of a county to a station's market and noting that the Act "does not preclude" the Commission from using its rulemaking procedures to amend Section 76.51 of the Rules, 47 C.F.R. § 76.51, Cypress concludes that in order to add Santa Clara County to KNTV's market, the Commission must redefine the Salinas-Monterey ADI as a whole and accord must-carry rights in

Santa Clara County to all stations currently assigned to the Salinas-Monterey ADI. Petition at 11.

It is obvious that Cypress's argument has no merit. First, as already noted, nothing in the Cable Act precludes the addition of a station's home county to its market for must-carry purposes. Second, the Act imposes no requirement to redefine the market of all stations assigned to an ADI simply because the market of an individual station in that ADI is modified, either by rulemaking or otherwise. Finally, Section 76.51 of the Commission's Rules has no relevance to the definition of markets for must-carry purposes. Indeed, the Commission has made this point abundantly clear in its Report and Order, noting that while the Cable Act directs the FCC to update Section 76.51, Congress also has specifically instructed the Commission to use current ADI markets to determine must-carry rights. Thus, the revision of Section 76.51 will have an impact on such matters as copyright liability and territorial exclusivity but will not affect must-carry rights.^{11/}

Cypress would, of course, like to convince the Commission that it may not accord must-carry rights to KNTV in Santa Clara County unless it automatically accords such rights to KCBA. However, Cypress has presented no legal or factual justification for the adoption of a rule that would produce this result. KCBA is not located in Santa Clara County, and thus there is no basis for adding that county to KCBA's market; to do

^{11/} Report and Order, ¶ 48.

so would be tantamount to abandoning the procedures adopted by the Commission for defining must-carry markets. KNTV's community of license, on the other hand, is located in Santa Clara County.

Like Cypress's other claims, this contention is erroneous and should be denied. Not only does Cypress fail to cite any authority whatsoever for its claim, but it also selectively cites the Commission's Notice of Proposed Rulemaking ("NPRM") in this docket in such a way as to omit those passages which alerted readers to the possibility that counties outside an Arbitron ADI might be added to a television station's market.

Section 553(b)(3) of the Administrative Procedure Act ("APA") requires that a notice of proposed rulemaking include "either the terms or substance of a proposed rule or a description of the subjects and issues involved."¹³ The

anticipated that the home county exception might be created.^{19/}

VI. The Commission's Decision to Adopt the Home County Exception Is Consistent With the Public Interest

After presenting yet another long and irrelevant discourse on territorial exclusivity, Cypress incongruously claims that because stations in the San Francisco-Oakland-San Jose market have not exercised territorial exclusivity rights against KNTV, KNTV enjoys an unfair competitive advantage over KCBA that will be exacerbated if KNTV is accorded must-carry rights in its home county of Santa Clara. This argument should be summarily rejected by the Commission because it is utterly without merit. The FCC has not modified its rules in any way to prevent stations in the San Francisco-Oakland-San Jose market from exercising territorial exclusivity rights against KNTV. Therefore, the fact that these stations have refrained from doing so has no relevance to the definition of KNTV's market for must-carry purposes, and the Commission's adoption of its home county exception is in no way anticompetitive or otherwise improper.

Moreover, the inclusion of Santa Clara County in KNTV's market for must-carry purposes promotes a fundamental goal of the

^{19/} It should also be noted that Granite suggested in its Comments that the Commission adopt a rule including each station's home county in its must-carry market. See Comments at 11. Thus, this specific proposal was before the FCC for consideration in its rulemaking proceeding, and Cypress had an opportunity to argue against it. Apparently, Cypress chose not to do so.

Cable Act, which is to protect and promote the value of "localism." Indeed, the Cable Act explicitly states that the Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the Communications Act's goals of providing a fair, efficient, and equitable distribution of broadcast services.^{20/} Thus, the FCC's decision to accord KNTV must-carry rights in the county in which its community of license is located clearly is in the public interest. Moreover, given KNTV's strong record of local service to the whole of Santa Clara County,^{21/} the exclusion of this area from KNTV's television market for must carry purposes would be contrary to the principle of localism that Congress intended to foster through the Cable Act and, therefore, contrary to the public interest.

VII. Conclusion

As demonstrated above, Cypress has presented no valid arguments in support of its request for reconsideration of the Commission's home county exception. Cypress repeatedly fails to cite any authority for its contentions, it obfuscates the home county issue by engaging in vague discourses on irrelevant

^{20/} See Cable Act, § 2(a)(9).

^{21/} KNTV places a Grade A or better signal over all of Santa Clara County and has a particularly strong record of covering Santa Clara County news. See Granite's Comments at 8-14.

subjects, and it seriously distorts the Cable Act. In sum, its Petition is baseless and frivolous.

FOR THE FOREGOING REASONS, Cypress's Petition for Reconsideration should be DENIED.

Respectfully Submitted,

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Dated: June 7, 1993

CERTIFICATE OF SERVICE

I, Rachel T. Barksdale, hereby certify that a copy of the foregoing "Opposition to Petition for Reconsideration" has been sent by hand delivery (*) or by United States mail, first class and postage prepaid, to the following on this 7th day of June, 1992:

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